for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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LEGISLATIVE REPORT: *The Good, the Bad & the Ugly*

by Christopher Johns

Introduction: The Good

Despite limited personnel resources, the Maricopa County Public Defender's Office continues to monitor legislative issues under Dean Trebesch's direction. Attorneys who participated in reviewing or testifying on legislative proposals did so in addition to their regular duties. Several spent considerable personal time on legislative matters. All activity was in strict compliance with the state's complicated public lobbyist laws.

Law enforcement and other groups are able to muster many times more resources and staff to shape public policy. Because of limited resources, our Office selected and followed four bills which most impacted our client community, and in our opinion would most significantly affect the public's constitutional rights, adversely affect our ability to represent clients, or unnecessarily raise litigation costs. They included: 1) juvenile victims' rights, 2) post-conviction relief, 3) incompetence to stand trial, and 4) the community safety act. To the extent possible, the Office also provided substantial information to legislative staff, upon request, on many other issues and legislation affecting the criminal justice system.

In the debate on the targeted legislation, the Office was able to provide testimony, input, background memoranda, and other information to inform legislators of both sides of the issues facing the criminal justice system. A substantial number of legislators continue to be receptive to listening to both sides of an issue and often appreciate the Office's input. In many instances, the Office's expertise resulted in improving bills (lessening the negative impact on indigent offenders or assisting in ensuring that legislation passed constitutional muster). In one instance, the Office worked with the County Attorney's Office to ensure that competency proceedings remain adversarial. The Office's long range goal continues to be to let legislators know that the Office is a reliable and accurate forecaster of the impact of criminal justice legislation, especially where proposed bills will have unintended consequences.

Special thanks goes to Helene Abrams (on juvenile victims' rights), Chuck Krull (post-conviction relief), and Barbara Spencer (competency proceedings) for the time and expertise they provided. All either spent

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substantial time analyzing legislation or provided testimony before legislative committees on critical issues affecting the delivery of representation to clients. The Office is also appreciative of AACJ's legislative liaison, Marty Lieberman, who at great personal sacrifice, provided support, information, and resources to help the Office. My thanks to everyone who helped. That's about it for the good.

What follows is a general summary of the most important bills affecting the criminal justice system. A few minor bills, mostly that make changes to personnel involved in law enforcement, have been omitted. For a few bills, analyses have been included, for example, for juvenile victims' rights and the community safety act.

Background: The Bad (mostly)

There were 957 bills (excluding memorials and resolutions) introduced in the last legislative session. Of those, 308 were sent to the Governor for his signature. Eight were vetoed. One other was vetoed in part, and one was allowed to become law without the Governor's signature. Two of the vetoed bills would have affected practitioners. HB 2015 would have expanded eligibility for intensive probation services and given trial courts more flexibility in dealing with probationers. SB 1133 would have exempted misdemeanor sexual offenders from submitting to blood tests for DNA. Unless an emergency clause was attached to a bill or delayed implementation, legislation enacted became effective on July 13, 1995. Approximately $574,000,000 of state monies, or almost 11% of the budget, went to protection and safety.

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for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

Legislation Enacted: The Ugly (mostly)

Bad checks (S.B. 1060).

This bill makes numerous changes to the restitution and garnishment criminal provisions, including establishing a county, bad-check trust fund administered by the county attorney.

The fund [A.R.S. 13-1811] allows a county attorney to defray costs of the investigation and prosecution of bad-check cases. The fund will be composed of monies collected from fees, and from public and private grants. Fees are based on the amount of the check, including up to 15% of the check's face value if it is greater than $1,000.00 [A.R.S. 13-1809(E)(4)].

Other provisions include explicit language stating that restitution is a criminal penalty for purposes of federal bankruptcy laws. And a procedure is set forth for obtaining and enforcing a criminal garnishment writ for monies owed to victims. A.R.S. 13-804(J) now also provides that the state may directly deduct monies owed for restitution from "any tax refund that is owed to the defendant."

The writ of criminal garnishment provision creates a statutory scheme to allow collection of fines, fees, restitution, *and* incarceration costs. Monies subject to garnishment include all earnings under A.R.S. 12-1598, personal property, corporation shares or securities, and "earnings or monies" held by Department of Corrections [A.R.S. 13-812(b)(6)].

Leaving accident scenes (S.B. 1027).

This enactment increases the criminal classification from a class 5 felony to a class 4 felony if a driver leaves the scene of an accident involving death or serious physical injury. If the person *caused* the accident, the penalty is a class 3 felony. Language previously requiring a driver to return "forthwith" is changed to *immediately* [A.R.S. 28-661].

Probation services (S.B. 1101).

This bill makes major changes to the statutory scheme for state aid to probation services. Beginning October 1, 1995, it transfers the authority to determine probation officer salary ranges from the court to the county board of supervisors by recommendation of the presiding judge (of either the adult or juvenile division of the superior court). A chief fiscal officer is also required by appointment of the board of supervisors. The fiscal officer is to establish and administer separate funds for all adult and juvenile probation monies.

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Juvenile victims' rights (S.B. 1149).

Starting April 1, 1996, provisions of the constitutional amendment creating victims' rights [art. 2, sec. 2.1] will be applied to juvenile offenses which if committed as an adult would be either felonies or misdemeanors involving physical injury, the threat of physical injury or sexual offense.

Like its adult counterpart, juvenile victims' rights provisions are triggered when a child is arrested or charged with an offense and continue until the final disposition of the case. Numerous provisions are made for speedy dispositions and notices to alleged victims.

The bill also amends A.R.S. 13-1415 to allow HIV testing of minors.

Analysis

Note that the legislature has again tried to limit or qualify victims' rights under section D of the constitutional amendment. Arguably, the legislature may no more limit crimes to which victims are entitled rights than they originally limited to just the adult system. The Office repeatedly, however, noted for legislators the specific problems of juveniles. For example, in many instances the juvenile crime victims are parents or guardians. Developing a plan for the child becomes problematic if his/her lawyer may not talk with parents because they are considered "victims." Additionally, potentially every schoolyard fight will create victims entitled to the enumerated constitutional protection. Concern was also expressed over the shorter time periods in juvenile proceedings.

Privacy and fourth amendment issues continue to be raised by any mandatory testing of individuals, let alone children, for HIV.

For the most part, the bill mirrors its adult counterpart. There are some differences practitioners may note. One, for example, clearly points out the problems with 13-4433(B). Under the juvenile version of this same statute, A.R.S. 8-290.22(B), the *prosecutor's office* shall inform the victim of the juvenile defendant's request for an interview *within ten days* after the request. This adds further strength to the argument that the term *promptly* as used in A.R.S. 13-4433(B) is constitutionally vague.

The HIV testing statute is also problematic. Privacy and fourth amendment issues continue to be raised by any mandatory testing of individuals, let alone children, for HIV. *But see, e.g., In the Matter of Juveniles A, B, C, D, E.* 847 P.2d 455 (Wash. 1993) The World Health Organization opposes all mandatory testing for HIV. Testing an accused or convicted person can *never* tell a victim whether he/she has been exposed to HIV. Only tests upon the victim can disclose this information.

Appeals and Post-Conviction Relief (PCR) (S.B. 1151).

This legislation further erodes clients' appeal and PCR rights. It eliminates requiring appellate courts to examine the entire lower court record for fundamental error and also requires the appellate court to dismiss an appeal if the appellant fails to pursue it.

A PCR will require a petitioner to state the substance of his/her claim. The court may raise preclusion on its own regardless of whether the state raises it. Also, limits extensions for time to file PCR petitions and the ability to amend the petition.

Juvenile victims' rights implementation fee (S.B. 1158).

A.R.S. 8-230.03 is amended to provide for an assessment of $15.00, starting July 1, 1995, against the parent of a juvenile who commits an offense involving a victim. The fee will pay some of the costs of implementing programs for juvenile victims' rights. The fee may be decreased or waived if the parent is unable to pay.

Community supervision (S.B. 1173).

This bill repeals the previously scheduled transfer of supervising offenders on community supervision to the courts. Community supervision will remain a duty of the ADOC (Arizona Department of Corrections).

Incompetence to stand trial (S.B. 1273).

This bill makes numerous changes to competency proceedings. It provides a new statutory framework that affects Rule 11. Once incompetence is now determined, this bill requires the courts to order competency restoration treatment, unless there is clear and convincing evidence the client will not regain competency within 15 months. Treatment may be extended in six-month increments if the client is making progress towards restoration.

The bill also authorizes in-patient or out-patient competency treatment, with the court selecting the least restrictive treatment alternative. The restoration treatment

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period may not exceed 21 months or the possible maximum sentence the client could have received for the charged offense.

If the client is found incompetent to stand trial and there is no substantial likelihood he/she will regain competency in 21 months, any party may ask the court to remand the client to the Department of Health Services for civil commitment proceedings, appoint a guardian, or release the accused from custody and dismiss the charges without prejudice. For the first time, a guardian may also petition the DHS or DES's development disabilities division (DDD). The bill also provided that DDD now has the authority to operate a secure residential facility.

In addition to these provisions, the bill amended the public defender enabling statute [A.R.S. 11-584(A)(e)] to permit the court to appoint the public defender's office for commitment hearings held under section 13-4518. Procedural aspects of the bill require the "parties" to provide *all available medical and criminal history records to the court* once a competency exam is requested. Also, A.R.S. 13-4502 now allows prosecutors or defense attorneys to file *any pretrial motion at any time while the defendant is incompetent* and the court may hear it if it determines the client's presence is not *essential.* A.R.S. 13-4507(B) also requires that *the defense attorney shall be available to the mental health expert conducting the examination.*

The legislation separates out an insanity determination, and for the first time mentions the "screening" motion (not provided by the rules but engaged in by Maricopa County Superior Courts as a mechanism to determine reasonable grounds). The insanity provisions now also provide that the *parties shall provide any additional medical or criminal history records that are requested by the court or the expert.*

Analysis

This bill started out much worse than it ended up being. For example, originally it intended to have only one doctor's report for competency and insanity. There are still provisions that are problematic, however. While it is important that experts obtain information relating to the client's medical records, one wonders why the court becomes the repository for this information and how the client's criminal history may be used against him/her. Procedurally, the three working days' time frame is also onerous.

Practitioners should note that this bill was the product of an *ad hoc* committee that started with the premise that too many offenders in Maricopa County were found incompetent. Having only one doctor, as well as some other provisions, is budget driven. Additionally, legislators were told repeatedly that there is a substantially large population of "murderers and child molesters" who continually are found incompetent in Maricopa County and are roaming the streets. Hence, the provisions for being able to confine the DD (developmentally disabled) population.

Of particular concern to practitioners may be the fact that a substantial portion of the bill is procedural, and to date there has been no change to Rule 11. Where the bill adversely affects clients, it may be attacked on those grounds. The Office has, however, tried to get a committee organized to look at the rule ramifications of the statute and provide a consistent framework for dealing with competency issues.

Practitioners will want to consult the statute when dealing with competency and insanity issues. Some changes will affect the client's future status once he/she is adjudicated incompetent. Although some provisions remain onerous, many now may help certain clients. For example, A.R.S. 13-4504 permits the court to simply dismiss misdemeanor charges if the person has previously been found incompetent. And, if a client is DD, special care should be taken in reviewing the statute, since it now provides a mechanism to place those clients in secure facilities.

Community safety act for sex offenders (S.B. 1288) . . . This is one of the scariest pieces of legislation you probably will ever read.

Community safety act for sex offenders (S.B. 1288).

This legislation is similar to a bill passed in Washington in 1990 in reaction to concerns about sexual offenders' release in the community. It makes sweeping changes to the sex offender registration requirements and (as best as I can understand it) creates the status offense of being a sexually violent predator.

First, A.R.S. 13-118 is amended to say that prosecutors may file a *special allegation of sexual motivation* which creates a special verdict finding.

Second, the bill makes numerous changes to the sexual registration statutes. A person who is found to have committed a crime that is sexually motivated must also register as a sex offender, even if he/she is a juvenile (although if a juvenile, the duty to register terminates at age 25). Juveniles are now also required to submit to DNA testing.

Starting on June 1, 1996, once a sex offender is released, he/she will have ten days to register. The

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previously vague provision of "promptly" under A.R.S. 13-3822 is also changed to ten days.

Furthermore, the bill creates a system for "*community notification.*" Three months before a sex offender's release, the chief law enforcement officer of the particular Arizona community is notified, as well as the victim. Law enforcement then notifies the community of his/her release. Guidelines for the notification are still to be completed by a legislative committee. This particular section does not apply to juveniles.

Third, this legislation creates a new criminal code chapter entitled "Sexually Violent Predators." If, for example, ADOC determines a person is a sexually violent predator, they must notify the county attorney before his/her release. The county attorney or attorney general may then file a *petition* in court alleging the offender is a sexually violent offender and the facts supporting the allegation. The petition may also be filed if the person is incompetent or has been found guilty except insane.

Next, the superior court determines whether there is probable cause for the petition. The person may then be incarcerated for an evaluation. A trial (a trial must be specifically requested or the court decides) is then held in 45 days to determine whether the person is a sexually violent predator.

A jury then determines beyond a reasonable doubt whether the person is a sexually violent predator. If so, he/she is committed to ADOC's mental health facility until the person's "abnormality" is changed or he/she is no longer a threat to public safety.

Analysis

This is one of the scariest pieces of legislation you probably will ever read. It is nothing less than Orwellian. Similar legislation, however, has survived a state constitutional challenge in Washington. On the other hand, parts of it have been held unconstitutional in a New Jersey case (still on review). In essence, the statute's sexual predator portion authorizes locking up people who may not be in any classic sense "mentally ill." As one commentator noted, it is essentially a "dangerousness court." At first blush it would also seem contrary to the U.S. Supreme Court's holding in *Foucha v. Louisiana* ___ U.S. ____, 112 S.Ct. 1780 (1992)(must be proven offender is mentally ill and dangerous). The scheme seems to set up a lifelong preventative detention.

Also, for those offenders already incarcerated, there would seem to be some ex post factor and double jeopardy issues by adding more punishment, and then trying and incarcerating a person for a previous act.

Additionally, although the notification guidelines are not promulgated yet, they are bound to be problematic.

Harassment and stalking (S.B. 1299).

A.R.S. 13-2921 is amended to change the elements of harassment and create the new crime of stalking. Harassment is now activity that causes a reasonable person to be seriously alarmed, annoyed or harassed. The new crime of stalking (A.R.S. 13-2923) is a course of conduct that 1) causes a person to fear imminent physical injury or death, or 2) causes a person to fear for his/her personal safety. Stalking is a class 4 or 5 felony depending on whether the person was in fear of imminent physical injury or death, or feared for his/her personal safety. Harassment is a class 1 misdemeanor.

Youth escapes (H.B. 2003).

This bill amends A.R.S. 13-2501, 2503, and 2504 to include escape from a secure juvenile care facility as a crime.

Department of corrections (H.B. 2111).

This bill requires the ADOC to establish parole officer qualifications, including physical, psychological, and education standards by amending A.R.S. 41-1604.

Wiretaps (H.B. 2290).

This legislation was introduced to conform Arizona's statutory scheme on "authorized" interception of wire, electronic or oral communications with corresponding federal statutes. Among other things, it provides for a minimum $10,000 recovery in civil damages for a person whose communication is illegally intercepted, disclosed or used. The bill also expands the definition of computer fraud to include intentionally exceeding the use of any computer, computer system or network [A.R.S. 13-2316(A)]. It also appears to give law enforcement more latitude on the types of crimes for which ex parte orders may be obtained [A.R.S. 13-3010(A)].

Contracted prison facilities aggravated assaults (H.B. 2292).

This bill also makes it a crime to commit aggravated assault by a prisoner against an entity contracting with ADOC, including counties, the federal bureau of prisons or any other federal agency.

Vetoes

S.B. 1133 would have deleted certain misdemeanor offenses from the requirement of DNA

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testing. In his veto message, the Governor claimed that since many offenders plead to misdemeanors that would be a felony, a veto was necessary.

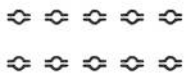
H.B. 2015 was also vetoed. It would have created expanded criteria for intensive probation and given courts more discretion to modify a probationer's terms.

On the Horizon

As of yet, the legislature's agenda for the next session remains vague. For the first time in several years there does not appear to be a major issue on the horizon. Reforming the juvenile justice system, however, still is on the agenda of some county attorneys, and there will probably be considerable fine tuning of various criminal code issues from the last two sessions.

The announcement by Senator Patti Noland that she will not run for her senate seat again may portend some interesting developments. Senator Noland has just about single-handedly shaped the state's criminal justice agenda in the last few years by creating victims' rights, shepherding major portions of the 1993 criminal code revisions, and getting through juvenile victims' rights and numerous other bills like the community safety act.

Last session Senator Noland sponsored a bill for a statewide capital representation project. Although an ardent death penalty supporter, Senator Noland acknowledges the need for quality legal representation of capital clients so that appeals periods may be shortened. Senator Noland also has been open to helping counties with indigent defense funding, and although she did not hear the statewide public defender bill last year, she remained open-minded. Still, it is much too early to tell what will develop. The Office is optimistic that it can continue to provide information to the legislature for a more balanced debate on criminal justice and indigent defense issues. Ω



Children's World

by Helene Abrams

No, this is not an article about day care, although finding reasonably priced, competent day care is an important subject for those of us who are pursuing careers while our young ones are growing up. This article is about judicial and legislative changes in the juvenile division of the Superior Court of Maricopa County.

First, congratulations to the Honorable John Foreman. Judge Foreman replaced the Honorable James McDougall as the new Presiding Judge of the Juvenile Division. The departure of Judge McDougall saddened many who have worked with him and Kathy Franklin, his faithful judicial assistant, for the past 12½ years. Their true devotion and commitment to the children of this community were demonstrated repeatedly during their tenure. Many positive changes resulted from Judge McDougall's participation with the legislature, the Arizona Supreme Court and the Commission on Juvenile Justice. Most importantly, Judge McDougall believed that active involvement of the "players" in our system would allow for smooth and efficient implementation of needed changes. Even when our position was a minority one, our concerns were listened to and considered. Both Judge McDougall and Kathy will be sincerely missed. Judge Foreman has promised new and challenging changes to Juvenile Court. We are hopeful Judge Foreman will welcome our participation, too.

This year's legislative changes in the delinquency area involved some tweaking (oh, how I hate that word) of the massive changes implemented last year in the Juvenile Omnibus Bill sponsored by Senator Patti Noland. Other changes were more substantial. For example: SB 1149 (Chapter 197) and SB 1158 (Chapter 101) will bring to juvenile court Victims' RIGHTS. Of course, some of us believed that we were doing just fine without this.

Effective April 1, 1996, victims' rights will be extended into the juvenile arena in cases involving felony offenses and misdemeanors involving physical injury and the threat of physical injury. (This includes the schoolyard brawl.) The legislation tracks the statutes applicable in adult court. This, of course, poses somewhat of a problem.

The most significant problem is that offenses involving intra-family conflicts are not exempted. As counsel for the accused child, one of our jobs is to find out what is happening in the family to assist in our evaluation of the case and to help us draft a treatment

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plan which will, hopefully, resolve the problems so this child will not return to court. If a parent is the victim of the offense, and he or she "buys in" to victims' rights, we, as counsel for the juvenile, may not discuss the allegations of the offense, the family dynamics, the child's medical or school problems, a treatment plan, etc. with the accusing family member. If the child is brought to court in handcuffs and leg irons (i.e., detained), how can we respond to the court when, at the end of the hearing, the judicial officer must decide if the child may or should go home? Juveniles have no right to bail. If you are in custody, the only way you get out is if the court allows you to leave. How can we advocate for our client when we cannot speak intelligently to the persons who may have the "keys" to the detention door (the accusing parent and the court)? Interestingly, SB 1158 requires the parents of a child who commits an offense involving a victim to pay $15.00 to victims' rights fund. Preparing for trial is equally troublesome, but even more difficult is the inability to work with the people who have raised this child and who may be able to help work out a rehabilitative disposition plan. Drug and alcohol abuse don't just happen to this child overnight. Family history must be examined. Physical and sexual abuse do not generally begin in this child's mind. There is a cycle which must be exposed and broken. If we can't work together, we won't develop a plan which is supported by those who most need to be a part of it. Hopefully, next session these concerns will be addressed.

How can we advocate for our client when we cannot speak intelligently to the persons who may have the "keys" to the detention door (the accusing parent and the court)?

Drive-bys and graffiti also received some attention. HB 2482 (Chapter 286) requires revocation of a driver's license for up to five (5) years for those convicted of a drive-by shooting. For those juveniles who deface or damage property, the court may restrict or deny a driver's license.

And in the "can't win for losin'" category . . . After this office's victory at the Court of Appeals on the "can't take blood from kids for DNA testing" issue . . . guess what? SB 1288 amended A.R.S. §13-4438 and 31-281 to require children adjudicated delinquent for those enumerated sex offenses to provide a blood sample for DNA testing. It also allows law enforcement to use the results in adult prosecutions. Looks like we better dust off the briefs again and ask the courts to consider our constitutional arguments.

The most interesting bill we watched this year was SB 1395, a.k.a. Bye-bye J.C.C. (Juvenile Court Center). Elimination of the juvenile court system, as we know it, was the goal of this bill. First, the definition of Superior Court was changed to Adult Criminal Division. All children 14 to 17 who are accused of committing serious offenses or who have three or more priors would be prosecuted in "Superior Court" (adult court). Clever, huh? The rest of the children would go to restorative community justice centers, run by the County Attorney. At the "center" the child could go through a deferral program -- but only if they admit the improper conduct. The consequence is then imposed by the "Board," made up of -- you guessed it -- county attorney appointees. I need not bore you with the rest of the details. A "strike all" was done at the Senate Judiciary stage and a study committee was suggested. The bill did not pass. Good news -- at least for this year. Ω

DUI This and That

by Gary Kula

GCI Mark IV Breath Machine

An evidentiary hearing is now pending in Phoenix City Court for an order to allow defense experts to examine one of the GCI Mark IV machines used by the City of Phoenix, to determine if there has been unauthorized modifications and repairs to the machine impacting on the machine's reliability and integrity. The defense has presented their position through the testimony of Kevin Knapp on cross-examination, George A. Pearson, an electrical engineer, and Chester Flaxmeyer, a criminalist and quality assurance specialist. Representing the defense are Clifford Girard, Christopher McBride and Jim Padish. This hearing was brought about after Clifford Girard made the discovery that the Phoenix Crime Lab has failed to maintain maintenance, repair and part replacement records for GCIs other than what is contained on the calibration cards, has no preventive maintenance program, maintains no electrical schematic, has no specialist specifically knowledgeable in the repair of sophisticated electronic equipment, has cannibalized parts without records from other non-working machines, has placed GCIs back into service with no explanation or

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record of repairs, and has retrofitted the GCI Mark IV with an outside pump connected directly to a wall socket without submitting that modification for approval by ADHS, the manufacturer or peer review. The defense contends that the GCI Mark IVs used by the City of Phoenix are unauthorized and not approved by ADHS, that the maintenance and repair procedures followed by the Phoenix Crime Lab do not conform to ADHS rules and regulations, and that the maintenance procedures followed by the crime lab are contrary to the manufacturer's recommendations and are contrary to generally accepted scientific, industrial, and engineering standards. The defense further maintains that the Phoenix Crime Lab's failure to maintain significant records is contrary to Arizona's public records law. The hearing is continuing in Phoenix City Court before the Honorable Judge Elizabeth Finn. If you have any cases which involve the Mark IV GCI breath testing machine from the City of Phoenix, you may want to contact either Clifford or Chris to discuss what motions need to be filed and how you can go about attacking the use of the test result in your DUI case. You can reach Chris McBride at 534-2380 and Clifford Girard at 252-7160.

Driving on an Implied Consent Suspension

Keep in mind that the mandatory 48 hours in jail for violating A.R.S. §28-473(B) does not apply to a driver who is under a one-year implied consent suspension for refusing to submit to a breathalyzer test. Nowhere within the provisions of A.R.S. §28-473(b) is there any language indicating that a person who is under an implied consent suspension, pursuant to A.R.S. §28-691, falls within the mandatory jail provisions. A person driving on an A.R.S. §28-691 implied consent suspension should properly be charged under A.R.S. §28-473(A).

Actual Physical Control (APC)

There is a long line of Arizona cases which have concluded that unless a motorist pulls completely off the travelled portion of the roadway and turns off the ignition, he cannot escape the presumption of actual physical control. The Arizona Supreme Court recently revised this standard as they addressed the issue of actual physical control in *State v. Love*, 193 Ariz. Adv. Rpt. 17 (filed June 27, 1995). In *Love*, the court rejected the "rigid mechanistic analysis" which has been traditionally applied to APC cases. The court went on to adopt a "totality of circumstances" test which allows the trier of fact to consider all of the attendant circumstances in determining whether the defendant was in actual physical control of his vehicle. In its decision, the court stated that "the totality approach recognizes that each situation may be different and requires the fact finder to weigh the myriad of circumstances in fairly assessing whether a driver relinquished control and no longer presented a danger to himself or others." *Love* at 18.

The court went on to state: "Factors which may be considered by a trier of fact in determining whether actual physical control existed, may include: whether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; if the vehicle's headlights were on; where the vehicle was stopped (in the road or legally parked); whether the driver had voluntarily pulled off the road; time of day and weather conditions; if the heater or air conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defense." The court in *Love* explained "this list is not intended to be all inclusive. It merely serves to illustrate that in every case the trier of fact should be entitled to examine all available evidence and weigh credibility in determining whether defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control over it while impaired." *Love* at 18.

Circumstantial Evidence of Driving.

In the same breath that they redefined the standards for actual physical control, the Arizona Supreme Court decided that even where a defendant is determined to have relinquished actual physical control, if it can be shown that such person drove while intoxicated to reach the place where he or she was found, the evidence will support a judgment of guilt. *State of Arizona v. Brown (Juan-Pascual, Real Party in Interest)*, 193 Ariz. Adv. Rpt. 21 (filed June 27, 1995). More specifically, the court held that "driving" while intoxicated or with a blood alcohol concentration of .10 or more may be proven by circumstantial evidence. *Brown* at 22.

"Juvy" DUI

Effective July 13, 1995, A.R.S. §8-232.01 increases the maximum juvenile DUI fine from $200 to $500 and requires that the court order the juvenile to pay the cost of screening, education or treatment, unless those costs are waived by the court.

MVD Point Suspensions

MVD has recently revised its policies as to the accumulation of points and the corresponding suspensions. Under the new MVD policy:

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1. A person who accumulates 8 to 12 points within a one-year time frame will be assigned to traffic survival school. If the person refuses to attend, a six-month suspension will be entered. If the person has already attended traffic school, there may not be a reassignment for two years and a three-month suspension will be entered.

2. If a person accumulates 13 to 17 points within a one-year time frame, he/she is not eligible for traffic survival school and a three-month suspension will be entered.

3. If a person accumulates 17 to 21 points within the one-year time frame, no traffic school will be available and his/her license will be suspended for six months.

4. If a person accumulates 21 or more points within a one-year time frame, once again, no traffic survival school will be available and a twelve-month suspension will be entered.

This MVD policy is already in effect.

Motorcycle DUI

If you have a case where your client is charged with DUI while on a motorcycle, you may want to contact NHTSA to obtain a copy of their recent publication *The Detention of DWI Motorcyclists*.

NOTE: In the May 1995 edition of ***for the Defense*** an omission was made -- the DUI article "Felony DUI: The Old and the New" neglected to give credit to Judge Michael Carroll of Phoenix Municipal Court for the use of his outline on prior convictions.

Editor's note: Mr. Kula is in private practice in Phoenix after serving for five years as a Deputy Public Defender at the Maricopa County Public Defender's Office. While at our office, he conducted in-house DUI training and served as the DUI Editor for this newsletter. His private practice is limited to criminal defense with an emphasis on DUI cases. Ω

RoUNd Up tHE uSual sUSpects

In case of defence, 'tis best to weigh
The enemy more mighty than he seems.
--Shakespeare
Henry, V, II, 4 1598-1599

Drugs & Crime

A few facts for your portfolio and your next round of "Drug Trivial Pursuit."

* According to the Office of National Drug Control Policy, the federal drug control budget increased from $1.5 billion in fiscal 1981 to $13.2 billion in fiscal 1995.

As reported in the 1993 BJS Sourcebook of criminal justice statistics--

* The federal government seized 6,605 clandestine drug laboratories between 1975 and 1993.

* In fiscal year 1993, of the 286 labs seized, 237 (83%) made methamphetamine.

* In 1993, the DEA's program for eradicating domestic marijuana resulted in the destruction of 393 million plants in 64,132 plots, 12,397 arrests, 6,062 weapons seized, and assets seized valued at $52 million.

* 94% of state police departments, 38% of local police departments, and 51% of sheriff's departments received money or goods from an asset forfeiture program.

* The median amount of bail set for a person charged with a drug offense was $5,000.

* Drug offenders accounted for 61% of sentenced inmates in federal prisons in 1993, up from 38% in 1986, and 25% in 1980.

* About 6% of state prison inmates belonged to a gang prior to incarceration.

Sex Offenses & AIDS Testing

The New Jersey legislature could not constitutionally require HIV testing for all of those who were charged with or convicted of sexual assault, while also providing that the results of such HIV testing were to

(cont. on pg. 10)☞

be released to the victim with no restriction as to the persons to whom he/she could communicate this information. As applied to those who had not yet been convicted of sexual assault, the statute represented a significant interference with an accused's right to determine what, if anything, would be done to his/her body. According to a New Jersey Superior Court, "it is difficult to imagine a search and seizure more intrusive than forcing an individual to first submit to the withdrawal of blood from his body, and then testing that blood for a disease which subjects those who have it to widespread and invidious discrimination, and then revealing the results of the test to an individual who is free to pass that information on to whomever she wishes." Furthermore, the disclosure of such HIV information to sexual assault victims did not achieve any compelling state interest. Expert medical testimony was presented that the results of a defendant's HIV test would have no affect on what steps a victim should take in monitoring her own health care or HIV status. *State in Interest of J.G.*, 1995 WL 251592 (N.J. Super.Ch.).

What Community Service Assignments Do Probationers Get

Have a question about the Maricopa County Adult Probation Department's community service assignments? Then call Doug Pilcher, the Special Services Supervisor [440-4410]. Adult probationers routinely have to perform between 20 to 360 hours of community service as part of their sentences. The Community Service Program (CSP) administers a probationer's placement with nonprofit agencies or governmental entities. The agencies have to agree to use probationers, and to do so under fair and humane conditions.

CSP's present active labor force is about 12,500 probationers. Adult probation works with over 1,300 agencies and last year over 400,000 hours of community service were performed.

Examples of community service included everything from clerical work like typing and answering "hot lines" to loading and unloading trucks, cooking, serving, roofing, painting, and landscaping.

Pima County Presiding Judge Proposes Audiotaping Preliminary Hearings

You probably heard about the Pima County case that preempted the county's local rule to audiotape preliminary hearings. Now Presiding Pima County Judge Michael Brown has proposed an amendment to Rule 5.2 that would allow audiotaping of preliminary hearings at the *discretion* of the presiding superior court judge.

The amendment to Rules 5.2, 5.6, and new Rule 5.7 would permit an audiotape, videotape or court reporter. Parties requesting copies would have to pay the *actual cost of reproduction*. Rule 5.7 would require the clerk to retain audiotapes or videotapes as the original court reporter notes. ^CJ

June Trial Results

May 1

Russ Born/ Shelley Davis: Client charged with first degree murder (death penalty) and armed robbery. Investigator D. Beever. Trial before Judge Hilliard ended June 2. Defendant found guilty on both counts. Prosecutor Clayton.

May 9

Valarie Shears: Client charged with aggravated assault. Bench trial before Judge Howe ended May 9. Defendant found guilty of a misdemeanor assault. Prosecutor Mitchell.

May 23

Gregory Parzych: Client charged with armed robbery. Trial before Judge Ishikawa ended June 2. Defendant found guilty. Prosecutor Brown.

June 1

Marie Farney: Client charged with two counts of forgery (with a prior). Investigator R. Gissel. Trial before Judge Trombino ended June 4. Defendant found guilty on both counts; hung jury on prior--state dismissed allegation. Prosecutor Clarke.

June 5

Shelley Davis: Client charged with aggravated DUI (with four priors). Trial before Judge Ryan ended on June 6. Defendant found guilty (with three priors). Prosecutor Ainley.

Pauline Houle: Client charged with aggravated assault, (dangerous and while on parole for murder) and misconduct involving weapon (prohibited possessor). Investigator A. Velasquez. Trial before Judge Hertzberg ended June 7. Defendant found **not guilty** on both counts. Prosecutor Harris.

(cont. on pg. 11)☞

June 6

Paul Klapper: Client charged with aggravated assault (dangerous). Investigator J. Allard. Trial before Judge Stover ended June 13. Defendant found guilty. Prosecutor Bartlett.

June 12

John Brisson: Client charged with aggravated DUI. Trial before Judge D'Angelo ended June 23. Defendant found guilty. Prosecutor Smith.

June 13

Kevin Burns: Client charged with two counts of resisting arrest and one count of trespassing. Investigator P. Kasieta. Trial before Judge O'Toole ended June 13. Defendant found guilty of one count of resisting arrest; trespassing charge and one count of resisting arrest were dismissed. Prosecutor Davis.

June 19

Wesley Peterson: Client charged with leaving the scene of an accident with a death or an injury. Trial before Judge Araneta ended June 28. Defendant found guilty. Prosecutor Baker.

Tim Ryan: Client charged with burglary. Trial before Judge Barker ended June 20. Defendant found guilty (with two priors). Prosecutor Puchek.

June 21

Ray Schumacher: Client charged with two counts of aggravated DUI. Investigator H. Jarrett. Trial before Judge Barker ended June 27. Defendant found guilty. Prosecutor Peters.

June 26

Rebecca Donohue: Client charged with aggravated DUI. Trial before Judge Wilkinson ended June 28. Defendant found guilty. Prosecutor Smith.

John Movroydis: Client charged with DUI with license revoked (with two misdemeanor priors). Trial before Judge Topf ended June 29. Defendant found guilty. Prosecutor Doran. Ω

Prison Population Rates Rise-- Arizona Remains Competitive

According to U.S. Department of Justice statistics, the nation's prison population exceeded one million for the first time in history. At the end of June 1994, 1,012,851 men and women were incarcerated in state and federal prisons. (State prisons held 919,143 inmates; federal prisons had 93,708. The number of female inmates grew 6.2 percent during the first six months of 1994 compared to a 3.9 percent increase among male inmates.)

The incarceration rate of state and federal prisoners sentenced to more than a year reached a record 373 prisoners per 100,000 U.S. residents last June.

In Arizona, the total prison population (state and federal) rose from 16,998 in June of 1993 to 18,809 in June of 1994, a 10.7 percent change. That meant that 448 prisoners were sentenced to more than one year in prison per 100,000 population in Arizona as of June of 1994.

The ten states with the highest incarceration rates in 1994 (based on the number of prisoners with sentences greater than one year per 100,000 residents) were:

Texas	545	prisoners/100,000
Louisiana	514	" "
South Carolina	504	" "
Oklahoma	501	" "
Nevada	456	" "
Arizona	448	" "
Alabama	439	" "
Michigan	423	" "
Georgia	417	" "
Florida	404	" "

The ten states with the highest annual prison population growth (06/30/93 to 06/30/94):

Connecticut	19.6%	change
Texas	18.4%	"
Tennessee	14.6%	"
Montana	14.5%	"
Virginia	13.6%	"
Georgia	12.2%	"
Mississippi	10.9%	"
Florida	10.8%	"
Wyoming	10.8%	"
Arizona	10.7%	"

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# # # # #

Bill Targets Prison Crowding

A state legislator says California can unstuff its crowded prisons by declaring the current practice of double-bunking to be standard operating procedure. Under a bill sponsored by Sen. Richard Polanco, D-Los Angeles, the prison system would go overnight from 176 percent occupancy to around 100 percent of a newly defined design capacity.

Training

Support Staff Training:
"Ethics in the Workplace" on Tuesday, August 8, 1:30-3:30 p.m. in the MCPD Training Facility; speaker--Mike Fusselman, Lead Investigator, Trial Group D.
For information, call Georgia Bohm, 506-8200.
Attorney:
Juvenile Issues Seminar on Monday, November 6, 1995.
Details and location to be announced.

Testimony From O.J. Simpson Trial; July 18, 1995

(In the following segment, prosecutor Christopher Darden and defense attorney Cochran argue about the scope of Officer Thompson's testimony:)

DARDEN: And because we're talking about the -- an issue of probable cause, I'd suggest, as well, that he has a right to rely on hearsay. And he should be allowed to tell the jury everything he knew and heard that morning that would suggest to any reasonable police officer that this defendant had killed two people, he should have been arrested and the jury should be made aware of that -- and should be made aware of it in the context of this so-called rush to judgment.

ITO: And what is your contemplated cross-examination of Officer Thompson at this point? That he was at Bundy, that he was aware of the crime scene issues?

DARDEN: Yes.

ITO: He was aware of the blood at the Rockingham address and based upon that, he saw no reason to disagree with Detective Vannatter's determination to hook up Mr. Simpson.

DARDEN: Yes.

ITO: I could do that in three questions.

DARDEN: Your honor, it would be more dramatic if we did it in 15, your honor.

ITO: But we're not here for drama, are we, Mr. Darden?

DARDEN: Well I'm not, not anymore, but --

COCHRAN: Yes, after the gloves --

DARDEN: You know, also, you know, I think it's important --

ITO: That wasn't an appropriate comment, Mr. Cochran. That was a cheap shot.

DARDEN: I'm sorry, did Mr. Cochran apologize?

ITO: Not yet, but he will.

. . . Ω

Bulletin Board

Speakers Bureau

Slade Lawson spoke to a Scottsdale Community College Substance Abuse class on June 12. Mr. Lawson addressed drug laws and legal issues regarding substance abuse.

Personnel

Attorneys:

Nancy Geiss will start on August 7 as one of our trial attorneys. For the last two years, Ms. Geiss has served as a Maricopa Deputy County Attorney.

Frank Johnson started at our Durango Juvenile Division on June 26, replacing Richard Salonick who moved to our Mesa Juvenile office. Mr. Johnson earned his B.A. in Psychology at the University of Michigan and his J.D. at the Detroit College of Law. Prior to coming to our office, Mr. Johnson was employed at the Department of Youth Treatment and Rehabilitation.

Support Staff:

Tonya Allen started as the new 10th floor receptionist on July 24.

Audrey Braun has served as the new clerk in our records division since July 03. Ms. Braun, who is pursuing a Justice Studies degree at Arizona State University, previously had summer employment in our records division.

Luke Clesceri joined our office as an investigator in Trial Group C on July 17. Mr. Clesceri spent 21 years with the Los Angeles Police Department before retiring in 1994. During the past year he was employed with the Yavapai County Sheriff's Office and the Yavapai Gaming Agency.

Ronald Corbett started as an investigator in Trial Group B on July 17. Mr. Corbett, who has a B.S. in Law Enforcement Administration from Wichita State University, retired in 1991 from the U.S. Army's Criminal Investigation Division after 19 years of service. Following retirement he worked as a private investigator.

Gloria Green joined Trial Group A as their Designated File Manager on July 17, replacing Randi Gillett who will move into a full-time secretarial position in the group. Ms. Green was previously employed with the Maricopa County Auto License Department from 1992 to 1995, and with Motorola as a data analyst from 1984 to 1991.

Cruzita Lucero started as a legal secretary in Trial Group B (replacing Brenda Sungino) on July 17. Ms. Lucero worked for the Maricopa County's General Accounting Department for two years and for the San Mateo County District Attorney's Office for nine years. From 1980 to 1983, she worked as chief clerk for Judge Ware at the Glendale Justice Court in Maricopa County.

Martha Lugo joined Trial Group D on July 24 as the new Designated File Manager (DFM). Ms. Lugo replaces Stephanie Valenzuela who will assume the secretarial duties of Naomi Manasco who is transferring to our Appeals Division.

David Scott Owen began employment as an investigator with our office in Trial Group B on July 17. Mr. Owen, who has an A.A.S. in Administration of Justice from Glendale Community College, retired from the Phoenix Police Department in 1994 after 20 years of service.

Sonia Vega will begin employment as an investigator in Trial Group A on July 31. Ms. Vega, who is fluent in Spanish, worked for ten years with the El Paso County Sheriff's Department before moving to Arizona this year.

Sandra Williams will start as Trial Group B's Designated File Manager (DFM) on August 7. Ms. Williams will take Michelle Fleming's place as Ms. Fleming assumes secretarial duties in that group.

Miscellaneous:

Lisa Araiza has been selected as the Lead Secretary in Trial Group A. Ms. Araiza has worked for our office as a legal secretary since 1986, and has been Acting Lead Secretary in Trial Group A since May.

Rena Glitsos, who has served as a trial attorney in our office since 1990, has been selected as the new Supervisor for Trial Group A.

Jim Haas has been named Senior Deputy to fill Bob Briney's former role with the office. Mr. Haas has been an attorney since 1980, and was in private practice until he joined our office in February of 1990. In February of 1993 he was named Trial Group Supervisor of Group A.

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Computer Corner

This column is designed to provide simple computer tips helpful to people in the legal field. These tips are designed for WordPerfect 5.1 in DOS. If you have any suggestions that you would like to share, please contact Georgia Bohm at *for The Defense* (506-3045). If you have any problems or questions regarding the tips offered below, contact Ellen Hudak in Trial Group B (506-8331) or Georgia.

Miscellaneous Tips

Blank Lines:
To create Blank Lines on a page or in a form:
hit **Shift-F8** for Format, **4** for Other, **7** for Underline spaces, **Y** for Yes on Spaces and **Y** for Yes again on Tabs, and **Exit**. To underline to the right margin, place the cursor anywhere you want line to start and press **Underline (F8)**, **Flush Right (Alt-F6)**, and **Underline (F8)** again. This inserts a blank line across the page. You can use **Tab** (as many times as you like) instead of Flush Right after you first hit **Underline** to make a line the width of tab(s). Remember to hit **Underline (F8)** a second time to end underlining.

Center line:
To begin text at the center of the line rather than just centering text on a line:
hit **Center (Shift-F6)**. Hit **Format (Shift-F8)**, **(O)** for Other and **(E)** for End Centering/Alignment. Type your text and press **Enter** when done. If your left and right margins are equal, the text begins at the center of the page. To facilitate regular use of this feature, create a macro for it. (*See Macros--Volume 5, Issue 5, Page 19.*)
NOTE: this is good for signature lines. E.g.,

Signature:_____

Deleting:
To delete from cursor position to end of line, hit **Ctrl-End**.
To delete from cursor position to end of page, hit **Ctrl-Page Down**. You will receive a prompt asking you "Delete remainder of Page? No (Yes)" to give you a chance to confirm the action. Hit **Y** for "Yes" to delete.
To restore last deletion, hit **Cancel (F1)** and **(1)** for **Restore**.

Dot leaders:
To quickly create a line of dots from one area of text to another:
hit **Flush Right (Alt-F6)** twice. Dot leaders appear from the cursor position to the right margin. At the right margin, start typing your information and the computer will justify the text to the right.
This is especially helpful when typing address/phone lists, tables of contents, etc. E.g.,
Exhibit C . . . . . Page 16

Or, hit **Center (Shift-F6)** twice for dot leaders from the cursor position to the center of the page. E.g.,
J. Leknow 555-5555

Locking:
To lock together words or numbers, such as a full name, a telephone number or a hyphenated word/phrase, so that they are not split between two lines, hit **Home-Space Bar** or **Home-Hyphen** when you are ready to space or hyphenate. By locking the characters together, the computer will continue to justify the line correctly. If you have to use a **Hard Return** to keep the characters together, you spoil the right justification of the line. E.g., to avoid splitting name, word or phone number, type

Mr.(**Home-Space Bar**)Jones
self(**Home-Hyphen**)improvement
555(**Home-Hyphen**)5050

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